LIFTING THE VEIL ON THE MLAT PROCESS: A GUIDE TO UNDERSTANDING AND RESPONDING TO MLA REQUESTS

Date: 20 January 2017

Government Enforcement Alert

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Prosecutors seeking information located in a foreign country are increasingly turning to a little known but very powerful tool: the Mutual Legal Assistance Treaty ("MLAT"). MLATs are bilateral agreements that effectively allow prosecutors to enlist the investigatory authority of another nation to secure evidence — physical, documentary, and testimonial — for use in criminal proceedings by requesting mutual legal assistance ("MLA requests"). Using MLA requests, U.S. attorneys can subpoena testimony from individuals in Japan, obtain documentary evidence from India, access electronic records in the United Kingdom, and acquire an executive's hard drive from Brazil. On the flipside, every one of those nations (and 61 others) has the same ability to request testimony, data, documents, and items inside the United States.

Perhaps because MLATs are unabashedly one-sided, offering no assistance to defendants involved in cross-border investigations, many attorneys are unfamiliar with the MLAT process. Nevertheless, for prosecutors in a world that is increasingly connected across international boundaries, MLA requests are steadily becoming more important as the number of international criminal prosecutions increases. In-house counsel facing the possibility of international investigations should, therefore, become knowledgeable about — and seek outside counsel familiar with — MLA requests. This article explains the MLAT process, identifies key provisions in MLATs, and suggests that, where possible, the best strategy for handling an MLA request may be cooperation.

MLATS AND THE MLAT PROCESS

The United States has entered into MLATs with 65 individual countries[1] and joined an agreement with the European Union ("EU") that enhances or creates mutual legal assistance mechanisms with each of the EU member states.[2] These treaties, although independently negotiated, generally maintain a similar framework and, in the United States, are administered by a central authority, the U.S. Department of Justice's ("DOJ's") Office of International Affairs ("OIA").[3] OIA orchestrates the MLAT process, processing all incoming and outgoing requests made pursuant to MLATs and other transnational legal assistance programs.[4]

Statistical information about MLATs, such as the number of requests filed by various countries or how long a request usually takes, is often difficult or impossible to locate.[5] DOJ's budget request for FY 2016 indicates that in 2000, the United States sent over 500 MLA requests and received over 1,500.[6] Since then, the numbers have steadily grown; the recent budget request indicates that in 2014, the United States sent over 1,000 requests and received around 3,250.[7] It further reflects that OIA had over 4,800 pending requests in 2014, even after

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instituting an internal policy for "refusing cases on *de minimus* grounds."[8] But there is little other information regarding MLAT requests made available to the public. In particular, there is markedly less publicly available data regarding the effect of MLAT requests or the average time it takes for requests to be processed. Indeed, DOJ itself has acknowledged this lack of a means of monitoring MLATs. OIA recently noted that it lacks transparency for monitoring "the progress of each request at each iterative step," and there is no "public-facing system" for MLAT partners to monitor the status of requests.[9]

In December 2013, a group called "Access Now" submitted a Freedom of Information Act ("FOIA") request to DOJ's criminal division seeking "the list of countries that have requested information through an MLAT and the type of information that was sought."[10]

When DOJ responded that there were no responsive records, the group appealed the determination, won, and the request was remanded, but there is still no indication that DOJ ever produced documents pursuant to the request.[11]

In May 2016, Representative Tom Marino introduced H.R. 5323,[12] which includes provisions to reform the MLAT process, including a requirement that DOJ publish MLAT statistics, including the number of requests and average processing time. To date, however, the bill remains in the House Judiciary Committee.

MLAT treaties refer to the parties as the "requesting" and "requested" nations, ensuring that both nations maintain the same rights and responsibilities under the treaty,[13] but OIA maintains separate processes for outgoing and incoming MLA requests. Outgoing requests are handled entirely within the executive branch, while incoming requests are supervised, in part, by the judiciary.[14]

Outgoing MLA requests

Outgoing MLA requests (requests that other countries furnish evidence to the United States) are handled exclusively by the executive branch. The U.S. Attorney's Manual instructs prosecutors to follow four steps to obtain assistance pursuant to an MLAT:

- Obtain a model request for the relevant MLAT Agreement from OIA.
- Prepare a draft request and submit to OIA for approval.
- Revise as directed by OIA and submit to DOJ for authorizing signature.
- Obtain a translation of the request, if necessary, and submit to OIA.

Once the request and translation are submitted, OIA files the request directly with the foreign authority specified in the treaty.[15] At this point, the request is formally complete and the foreign authority is bound, under the MLAT, to assist the investigation.

Note that because MLATs are investigatory, no judges are involved in the process of submitting an *outgoing* MLA request. Nor is there any requirement for providing notice to the target of the investigation or any opportunity for the target to challenge or attempt to limit a request. A U.S. attorney investigating the activities of a German auto manufacturer, for example, can prepare a request, submit it to OIA, receive approval, have the request submitted to German authorities, have evidence seized and delivered to the United States, and review that evidence all without a U.S. judge even being notified. And while Germany has civil liberties protections comparable to those

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found in the United States, the same cannot be said for all MLAT partners — a list that includes countries like South Africa, Nigeria, Turkey, and Russia. The absence of any opportunity to challenge the action makes MLATs an extremely powerful tool for U.S. prosecutors when it comes to gathering information. It is important to remember, however, that evidentiary protections remain in place; that is, to be admissible in court, the evidence must still meet all of the relevant requirements of the Federal Rules of Evidence.

Tolling the Statute of Limitations

Notably, a prosecutor who files an outgoing MLA request is likely to petition the court to toll the statute of limitations under 18 U.S.C. § 3292. Under Section 3292, if the court finds by a preponderance of the evidence that it "reasonably appears" that the requested evidence is located in the country where the prosecutor has filed the MLA request, the statute of limitations is tolled from the date of the MLA request. Although obtaining a tolling order requires judicial approval, the hearing will be *ex parte* and the potential defendant has no right to notice. Tolling will continue for up to three years or until the foreign government takes its final action on the request. While courts are unlikely to allow prosecutors to abuse the tolling function of Section 3292, the relatively low burden and lack of any opportunity to respond practically means that in almost any instance where a prosecutor is willing to go through the process of filing an MLAT, the statute will be tolled.

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Notes:

[1] Antigua and Barbuda, Argentina, Australia, Austria, the Bahamas, Barbados, Belgium, Belize, Bermuda, Brazil, Canada, Cyprus, Czech Republic, Denmark, Dominica, Egypt, Estonia, Finland, France (including St. Martin, French Guiana, French Polynesia, Guadeloupe, and Martinique), Germany, Greece, Grenada, Hong Kong, Hungary, India, Ireland, Israel, Italy, Jamaica, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Morocco, the Kingdom of the Netherlands (including Aruba, Bonaire, Curacao, Saba, St. Eustatius, and Saint Maarten), Nigeria, Panama, the Philippines, Poland, Portugal, Romania, Russia, Slovak Republic, Slovenia, St. Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, South Africa, South Korea, Spain, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, Ukraine, United Kingdom (including Anguilla, British Virgin Islands, Cayman Islands, the Isle of Man, Montserrat, and Turks and Caicos), Uruguay, and Venezuela.

[2] Bureau of International Narcotics and Law Enforcement Affairs, 2016 International Narcotics Control Strategy Report (INCSR): Treaties, http://www.state.gov/j/inl/rls/nrcrpt/2016/vol2/253357.htm.

[3] *See* DOJ, *Office of International Affairs Homepage*, https://www.justice.gov/criminal-oia.

[4] The United States also maintains a Mutual Legal Assistance Agreements (MLAA) with China and between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States. Certain executive agreements can also be cast into this category, but these pertain primarily to asset forfeiture and narcotics investigations.

[5] Although some companies, like Google, publish "Transparency Reports" that contain data on the number of requests for information, sorted by country, requests pursuant to MLATs are made by the U.S. government and are lumped in with other requests coming from the U.S. government. Accordingly, it is impossible to discern the number or origin of MLA requests from these documents.

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[6] DOJ, Criminal Division *FY 2016 President's Budget* at 22.

[7] *Id.*

[8] *Id.* at 25–26.

[9] *Id.* at 23.

[10] https://www.accessnow.org/cms/assets/uploads/archive/docs/foia/ MLAT%20original%20-%20DOJ.pdf?redirected.

[11] https://www.accessnow.org/cms/assets/uploads/archive/docs/foia/MLAT%20-%20Appeal%20response.pdf?redirected

[12] https://www.congress.gov/bill/114th-congress/house-bill/5323/text.

[13] *See, e.g.*, Mutual Legal Assistance Treaty Between the United States of America & Brazil (October 14, 1997) ("U.S.-Brazil MLAT").

[14] *See* T. Markus Funk, *Federal Judicial Center International Litigation Guide: Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges* (2014).

[15] *See* U.S. Attorney's Manual, Criminal Resource Manual 276, *Treaty Requests*.

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